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Presiding Disciplinary Judge  
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**IN THE SUPREME COURT OF ARIZONA**

In the Matter Of	)	
	)	
PETITION TO AMEND RULES	)	
	)	Arizona Supreme Court No. _____
SUPREME COURT OF ARIZONA	)	
	)	
_____	)	

Pursuant to Rule 28, Rules of the Supreme Court, the Honorable William J. O’Neil, Presiding Disciplinary Judge of the Supreme Court of Arizona, and Chair of the Attorney Regulation Committee (ARC) petitions this court to adopt amendments to Rule 51, 56, 57, 58, 60, 61, and 63 the *Rules of the Supreme Court of Arizona* as reflected in the accompanying Appendix A.

**I. INTRODUCTION**

Effective January 1, 2011, this Court adopted changes to the attorney discipline system, including the establishment of the Office of the Presiding Disciplinary Judge. The Presiding Disciplinary Judge (PDJ) presides over attorney discipline and disability proceedings, and also issues orders and opinions as part of a three member hearing panel. These orders and opinions are typically final orders that may be appealed to this Court.

To implement these changes to the attorney discipline system, certain changes were approved by this Court. Multiple technical changes have previously been approved by this Court to fully implement those changes. More than two years have passed since the system has been

implemented. During the course of that time, multiple issues of inconsistency or needed clarification have surfaced. The Attorney Regulation Committee intends to perform a comprehensive review of these rules. However, its attention has been focused on a comprehensive review of the admissions process. An additional petition may follow as a result of the more thorough examination of these rules may follow.

Attorney discipline and disability proceedings are *sui generis* or unique unto itself. See Rule 48 of the Rules of the Supreme Court. As a result the Office of the Presiding Disciplinary Judge is primarily guided by the disciplinary rules set forth within the Rules of the Arizona Supreme Court or other rules incorporated into those rules (See Rule 47) and case law. Clarity and direction for this process are critical. The interest of the public and the profession would be served by amending this rule expeditiously.

## **II. SUMMARY OF THE PROPOSED AMENDMENT**

Rule 51. Presently there is no stated process by which a change of judge for cause is conducted. The civil rule addressing change of judge for cause has not been incorporated into the discipline rules. This rule change will bring clarity and a clear process to follow.

Rule 56. This rule addresses diversion agreements. The rule as presently exists does not expressly authorize the entry of a diversion agreement after probable cause has been found but before the complaint is filed. This amendment expressly permits that process.

Rule 57. Under the prior system, a report and recommendation was made in all cases. Unfortunately the correction to the language of that system was overlooked in the prior rule petition. The presiding disciplinary judge does not issue a report for agreements of discipline but rather a decision. Further disbarment by consent no longer requires multiple copies as it is filed with the disciplinary clerk. This amendment clarifies that process.

Rule 58. In a prior request to amend the default rule the Court declined to adopt the recommendations of ARC and instead expanded the time for the effective date of default beyond

what is existent within the civil rules. In short, lawyers facing discipline are granting time to respond which is beyond what the public would receive. This proposal more closely mirrors the civil rule and times the effective date of a default from the filing, rather than the service of the entry of default.

Other amendments include removing the term “report” and replacing it with “judgment”. The disciplinary system now uses a recording system rather than a court reporter. The amendment proposed clarifies the duty of the disciplinary clerk regarding the record.

Rule 59. Corrections are proposed to again replace the word report with the term judgment.

Rule 61. These changes correct the language which again uses “report” when the PDJ makes a decision involving interim suspension.

Rule 63. These changes better clarify the process involved with the PDJ on matters of incapacity and authorize the probable cause committee to recommend the filing of a petition alleging a lawyer to be incapacitated.

### **III. CONCLUSION**

The approval of this procedural amendment offers clarity, greater consistency, and procedural guidance to the discipline process. It is offered with the intent to better protect the public we serve, the profession, and the respondent attorneys who appear before the PDJ. This proposed amendment will better assure all involved of an effective, uniform and timely resolution of temporary suspension requests.

DATED this 30<sup>th</sup> day of April 2013.

\_\_\_\_\_  
s/William J. O’Neil  
William J. O’Neil  
Presiding Disciplinary Judge  
Supreme Court of Arizona

**ORIGINAL ELECTRONICALLY** filed  
with the Clerk of the Arizona Supreme Court  
this 30<sup>th</sup> day of April 2013:

## APPENDIX A

### ARIZONA RULES OF THE SUPREME COURT

#### Rule 51(d)

*Change of Presiding or Acting Presiding Disciplinary Judge for Cause.* The presiding or an acting presiding disciplinary judge shall not be subject to disqualification for cause by the parties to a proceeding except as provided in Rule 2.11 of the Arizona Code of Judicial Conduct. Any motion to disqualify the presiding or an acting presiding disciplinary judge for cause shall be supported by an affidavit specifically alleging the grounds for disqualification. A motion and affidavit shall be timely if filed within fourteen days after discovery that grounds exist for the disqualification of the judge pursuant to Rule 2.11. No event occurring before such discovery shall constitute a waiver of the right to move for a change of judge under this rule. The disciplinary clerk shall designate a volunteer attorney member from the hearing panel pool to decide the motion and to determine by a preponderance of the evidence whether the motion has been timely filed and, if so, whether cause exists based solely on the motion and the other party's response to proceed to an evidentiary hearing. If not, the motion shall be summarily denied and the matter shall be assigned back to the presiding or acting presiding disciplinary judge. Otherwise, an evidentiary hearing shall be held. Following the hearing, depending on the ruling of the assigned hearing panel member, the disciplinary clerk shall assign the matter back to the presiding or acting presiding disciplinary judge or reassign the matter to another acting presiding disciplinary judge.

~~*Change of presiding disciplinary judge for cause.* The presiding disciplinary judge shall not be subject to removal by the parties to a proceeding except upon the grounds set forth in A.R.S. 12-409(B). Any request to remove the presiding disciplinary judge for cause shall be filed as soon as the grounds for removal are discovered. The disciplinary clerk shall designate a volunteer attorney member from the hearing panel pool to hear the matter and to decide by a preponderance of the evidence whether cause exists. Following the hearing, depending on the findings of the assigned hearing panel member, the matter shall be reassigned to the presiding disciplinary judge or referred to the disciplinary clerk for designation of an acting presiding disciplinary judge.~~

#### Rule 56

(c) *Diversion agreement or order.* If diversion is offered and accepted prior to an investigation pursuant to Rule 55(b), the agreement shall be between the attorney and the state bar. If bar counsel recommends diversion after an investigation pursuant to Rule 55(b) but before authorization to file a complaint, the recommendation for an order of diversion shall be submitted to the committee for consideration. If the committee rejects the recommendation, the matter shall proceed as otherwise provided in these rules. If diversion is offered and accepted after authorization to file a complaint ~~has been filed~~, the matter shall proceed pursuant to Rule 57. If the presiding disciplinary judge rejects the diversion agreement, the matter shall proceed as provided in these rules.

## Rule 57

4. *Presiding disciplinary judge ~~report~~decision.* Within thirty (30) days of the submission of an agreement or the conclusion of hearing, if one is held, and receipt of the transcript, if any, the presiding disciplinary judge shall file a report decision with the disciplinary clerk and serve a copy on the parties. The report decision shall accept, reject or recommend modification of the proposed agreement. The report decision shall incorporate all or portions of the agreement, as appropriate.

5. *Disbarment by consent.* The following provisions shall apply to admissions that constitute disbarment by consent:

A. Any member against whom charges have been made or a formal complaint filed may voluntarily consent to disbarment by filing with the disciplinary clerk, ~~in duplicate original, a an original,~~ written, verified consent to disbarment in the form prescribed in these rules or as otherwise approved by the court. The consent to disbarment shall be effective only upon acceptance by the presiding disciplinary judge. The general form of consent to disbarment shall be as follows:

## Rule 58

(d) *Default procedure; aggravation/mitigation hearing.* If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, enter that party's default and serve a copy of the notice of default upon respondent and bar counsel. A default entered by the disciplinary clerk shall be effective ten (10) days after service entry of the ~~notice of~~ default, upon which the allegations in the complaint shall be deemed admitted. A default shall not become effective if the respondent ~~pleads or otherwise defends~~ files an answer within ten (10) days from the service entry of the notice of default. Entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c), Ariz.R.Civ.P. The presiding disciplinary judge shall schedule an aggravation/mitigation hearing before the hearing panel. Not less than fifteen (15) days before the date set for the aggravation/mitigation hearing, the presiding disciplinary judge shall serve notice of the hearing on the parties. The hearing shall be held not earlier than fifteen (15) days nor later than thirty (30) days after the entry of default. The hearing panel shall prepare a report judgment as provided in paragraph (k) of this rule.

(k) *Report Judgment.* Within thirty (30) days after completion of the formal hearing proceedings or receipt of ~~the transcript~~ post hearing memorandums, whichever is later, the hearing panel shall prepare and file with the disciplinary clerk a written report judgment containing findings of fact, conclusions of law and an order regarding discipline. ~~The disciplinary clerk shall preserve the together with a~~ record of the proceedings. Sanctions imposed shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* and, if appropriate, a proportionality analysis. The report judgment shall be signed by each member of the hearing panel. Two members are required to make a decision. A member of the hearing panel who dissents shall also sign the report judgment and indicate the basis of the dissent in the report judgment. The disciplinary clerk shall serve a copy of the report judgment on respondent and on bar counsel of record. The hearing panel shall notify the parties when the report judgment will be filed outside the time limits of this rule and shall state the

reason for the delay. The ~~decision-judgment~~ of the hearing panel is final, subject to the parties' appeal rights as set forth in Rule 59.

#### **Rule 59. Review by the court.**

(a) *Notice of appeal.* Within ten (10) days after service of a ~~judgmentreport~~ of the presiding disciplinary judge, except reports regarding consent agreements, or a hearing panel, denial of reinstatement, respondent or the state bar may appeal by filing with the disciplinary clerk a notice of appeal and serving a copy on the opposing party. An opposing party may file a notice of cross-appeal within ten (10) days from service of the notice of appeal and serve a copy on the opposing party.

(b) *Extension of appeal time.* The presiding disciplinary judge may, upon motion filed not later than 30 days after the expiration of the time for appeal and a showing of excusable neglect, extend the time for filing the notice of appeal for a period not to exceed fourteen (14) days from the date of the order granting the motion.

(c) *Stay pending appeal.* A respondent may seek a stay of the decision of the hearing panel by filing a request with the hearing panel within ten (10) days of the date the ~~judgmentreport~~ was filed.

#### **Rule 61(c)**

2. *All other grounds for interim suspension.* The state bar may file a motion for interim suspension with the presiding disciplinary judge. The motion shall be accompanied by verification or separate affidavit upon personal knowledge stating sufficient facts to support the requested suspension, and shall include a copy of any related hearing panel ~~reportdecision~~.

B. *Hearing.* After receiving the response or after the time for filing a response has passed, the presiding disciplinary judge shall, within ten (10) days, conduct an evidentiary hearing, unless the parties have stipulated to the entry of an order of interim suspension. The state bar shall have the burden of establishing probable cause that the basis of the requested relief exists and that interim suspension is appropriate. The presiding disciplinary judge is not bound by common law or rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice. Respondent shall have the right to present evidence, cross-examine witnesses, and be represented by counsel. Within five (5) days after the matter is deemed submitted or a hearing is held, the presiding disciplinary judge shall file a ~~reportdecision~~ and an order.

(e) *Review by the court.* Either party may seek review of the presiding disciplinary judge's decision.

1. *Appeal.* Within five (5) days after service of a ~~reportdecision~~ and order of the presiding disciplinary judge, respondent or the state bar may appeal by filing an opening brief with the disciplinary clerk. An answering brief may be filed with the disciplinary clerk no later than five (5) days after service of the opening brief. Briefs shall conform to the requirements of ARCAP 6(c). Briefs shall not exceed ten (10) pages and shall not be bound. The content of the briefs shall

conform to ARCAP 13. After the time for filing the appellate briefs has expired, the disciplinary clerk shall transmit the entire record, including any transcripts and the parties' briefs, to the clerk of the court.

2. *Stay pending appeal.* Within five (5) days after service of a ~~report decision~~ and order of the presiding disciplinary judge, a respondent may seek a stay of the decision by filing an application for stay with the disciplinary clerk, along with the opening brief on appeal. The state bar may file a response with the disciplinary clerk, along with the answering brief on appeal, within five (5) days after service of the application for stay. The disciplinary clerk shall transmit the application for stay with the record as set forth in paragraph (e)(1) to the clerk of the court. The court shall promptly rule on the application for stay, which shall not be granted unless good cause is shown.

### **Rule 63**

1. *Judicial determinations of incapacity.* If a lawyer has been judicially declared incompetent, incompetent to stand trial, or is voluntarily or involuntarily committed on the grounds of incompetency or other disability or incapacity in a court proceeding, the presiding disciplinary judge, upon motion of bar counsel and proper proof of the fact, shall enter an order ~~of transfer~~ immediately transferring the lawyer to disability inactive status for an indefinite period until further order. A copy of the order shall be personally served upon the clerk of the court, the lawyer, the lawyer's guardian and conservator, and the director of the institution to which the lawyer may have been committed.

2. *Interim order of incapacity.* When it appears to the state bar, the committee, the presiding disciplinary judge, or the hearing panel that a lawyer may be incapacitated to the extent that the lawyer may be causing harm to the public, the legal profession or the administration of justice by reason of a mental or physical condition or because of addiction to drugs or intoxicants, ~~bar counsel may file~~ a motion, setting forth facts to support a prima facie finding of incapacity and accompanied by verification or affidavit, ~~may be filed~~ with the disciplinary clerk, for an order temporarily transferring the lawyer to disability inactive status pending a hearing to determine incapacity as provided in this rule. The motion for an interim order of incapacity may be filed with the petition requesting transfer to disability inactive status. A response may be filed within five (5) days of service of the motion. The motion or response, if one is filed, will be personally served upon the lawyer alleged to be incapacitated and a notice of service will be filed with the disciplinary clerk. The presiding disciplinary judge may issue an order in the nature of a temporary restraining order and impose such conditions as necessary to protect the public. The interim order of incapacity shall be personally served on the clerk of the court and the lawyer alleged to be incapacitated and shall remain in effect until the hearing to determine incapacity is held. Within ten (10) days of being served with the interim order of incapacity, either party may file with the disciplinary clerk a notice of intent to appeal to the court, pursuant to Rule 59.

3. *Finding of incapacity to discharge duty.* If it is alleged by a lawyer or otherwise appears in the course of a discipline proceeding that the lawyer is incapacitated or impaired by reason of a mental or physical condition or because of addiction to drugs or intoxicants, and the lawyer lacks the capacity to adequately discharge the lawyer's duty to clients, the bar, the courts or the public, a petition may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative



or upon a recommendation of the committee, the presiding disciplinary judge, or the lawyer alleged to be incapacitated.

4. *Finding of incompetency to assist in defense.* If it is alleged by a lawyer or otherwise appears in the course of a discipline or disability proceeding that the lawyer is unable to understand the proceedings or assist in the lawyer's defense as a result of a mental or physical condition, the presiding disciplinary judge, sua sponte, or upon motion of bar counsel, shall immediately transfer the lawyer to disability inactive status on a temporary basis pending a determination of competency, and all pending discipline proceedings shall be temporarily stayed. When a lawyer files a petition requesting transfer to disability inactive status alleging incompetence to assist in the lawyer's defense, the petition shall be processed according to paragraph (c) of this rule.

(c) *Proceedings to determine incapacity or competence.*

1. *Petition* A petition requesting transfer to disability inactive status may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative or upon a recommendation of the committee, or the presiding disciplinary judge, or the lawyer alleged to be incapacitated. The petition shall be accompanied by affidavits, reports, or other documentation to support a prima facie finding of incapacity.

5. *Report of presiding disciplinary judge.* Within thirty (30) days after the hearing or filing of the hearing transcript~~post hearing memorandum ordered~~ or stipulation, the presiding disciplinary judge shall prepare and file with the disciplinary clerk a ~~report~~decision and order containing findings of fact and conclusions concerning transfer to disability inactive status based on a determination of incapacity to discharge duty or competency to assist in defense. The presiding disciplinary judge shall also serve a copy of the report and the order transferring the lawyer to disability inactive status on the parties. Thereafter, the lawyer shall be transferred to disability inactive status subject to a right to appeal. If a party does not appeal the order of transfer, the presiding disciplinary judge shall notify the court of same by memorandum, and the decision shall be final.

6. *Appeal.* Either party may appeal the presiding disciplinary judge's decision and order regarding transfer of a lawyer to disability inactive status as provided in Rule 59.

(d) *Status of pending disciplinary proceedings.*

3. *Order to show cause.*

A. *Petition.* In the case of a lawyer who has been transferred to disability inactive status, if information comes to the attention of the state bar indicating that good cause no longer exists to maintain a stay imposed pursuant to paragraph (d)(1) of this rule, or that the lawyer appears no longer to be incompetent and a stay imposed pursuant to paragraph (d)(2) of this rule is no longer

appropriate, the state bar shall file with the disciplinary clerk a petition for order to show cause.

*B. Hearing.* The presiding disciplinary judge shall issue an order requiring the lawyer to show cause why an existing stay of pending discipline proceedings imposed upon a showing of good cause or upon a finding of incompetency should not be lifted. The only issue to be addressed at the hearing is whether such a stay should be lifted. The burden of proof to maintain the stay shall be upon the lawyer.

*C. ~~Report~~ Decision and Order of presiding disciplinary judge.* The presiding disciplinary judge shall, as soon as practicable, prepare and file with the disciplinary clerk a ~~report~~ decision containing findings of fact and an order ~~recommendation~~ concerning whether the stay should be lifted. The presiding disciplinary judge shall also serve a copy of the ~~report~~ decision and order on the parties. If an order is entered ~~Upon a~~ finding that an existing stay is no longer supported by good cause, or if an order is entered ~~upon a~~ finding that a lawyer is no longer incompetent, any stayed discipline proceedings shall resume. ~~, subject to appellate review by the court.~~

*D. Appeal and review.* Appeal from the presiding disciplinary judge's order shall be as set forth in paragraph (c)(6) of this rule. If the court accepts the presiding disciplinary judge's finding that an existing stay is no longer supported by good cause or that a lawyer is no longer incompetent, any stayed discipline proceedings shall resume.